Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

ALEXANDER P. SOMMER,
and his counsel, JOHN G. WARNER,

Petitioners,

vs.

UNUM LIFE INSURANCE COMPANY OF AMERICA

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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29 pp

QUESTION PRESENTED

There is a single question presented in this petition.

Did the Court of Appeals for the Ninth Circuit commit judicial error by concluding that in an ERISA case a beneficiary under a long-term disability plan is barred by the doctrine of res judicata from filing a second lawsuit to enforce his or her entitlement to benefits, after *subsequently* exhausting his or her administrative remedies?

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CITATION TO THE OPINION BELOW

The unreported opinion of the Court of Appeals for the Ninth Circuit is reprinted in the accompanying Appendix ("App.") at pages 1 through 8.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1252(1). The Ninth Circuit's opinion was filed on May 10, 2002. This Petition for Certiorari is being filed within 90 days of the Ninth Circuit's opinion as required by Supreme Court Rule 13.1

FEDERAL STATUTE INVOLVED

This case involves the interpretation of a statute under what is called the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§1001-1461.

The ERISA statute cited in this Petition is found in 29 U.S.C. §1132(a) which provides in relevant part:

§1132. Civil enforcement

(a) **Persons empowered to bring a civil action**

A civil action may be brought –

(1) By a participant or a beneficiary –

. . . .

(B) To recover benefits due to him under the terms of his plan, to enforce his rights under

> the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> . . . .

STATEMENT OF THE CASE

On May 22, 1996 Petitioner Alexander P. Sommer (hereafter "Petitioner") filed a complaint in the San Francisco Superior Court against Respondent UNUM Life Insurance Company of America (hereafter "Respondent") to enforce benefits under a long-term disability insurance plan administered by Respondent as part of an employee benefits program. Although Petitioner alleged three separate ERISA claims under three separate long-term disability insurance plans, for purposes of this Petition the only insurance plan at issue is the one provided by Respondent to Petitioner's last employer, a securities dealer known as Wedbush Morgan Securities ("Wedbush").

On July 2, 1996 Respondent removed the case to federal district court claiming federal jurisdiction under the Employee Retirement Income Security Act of 1974 ("ERISA"). After hearing argument on Respondent's motion to dismiss, the district court granted that motion on the ground that Petitioner had failed to exhaust his administrative remedies.

On August 18, 1997 Petitioner filed a timely notice of appeal. In an unpublished opinion dated March 24, 1999, the Court of Appeals for the Ninth Circuit affirmed.

Thereafter, Petitioner resubmitted his claim to Respondent in an attempt to exhaust his administrative

remedies. After Respondent failed to administer Petitioner's resubmitted claim, on April 20, 2000 Petitioner filed a second lawsuit against Respondent based upon the same claim. On January 8, 2001 the district court dismissed the second lawsuit, on the ground that it was barred by the doctrine of res judicata.

On April 9, 2001 Petitioner filed a timely notice of appeal. In an unpublished decision dated May 10, 2002, the Court of Appeals for the Ninth Circuit affirmed.

STATEMENT OF FACTS

Petitioner was employed as an account executive from November 1988 through December 1992, for a company called Henry F. Swift & Co. ("Swift"), a securities firm. Throughout Petitioner's employment with Swift, The Paul Revere Insurance Company ("Paul Revere") issued long-term disability insurance coverage to Swift's employees such as Petitioner. After Swift merged with a company called Piper Jaffray, Inc. ("Piper") in January 1993, Petitioner worked as an account executive for Piper. However, in August 1994 Piper fired Petitioner for lack of production. Approximately one month later Petitioner obtained employment as an account executive at Wedbush where he was employed from September 1994 through January 1996. In January 1996, Petitioner's poor health forced him to terminate permanently his employment. During all of the time Petitioner worked for Piper and Wedbush, Respondent issued long-term disability insurance coverage to Piper and Wedbush employees such as Petitioner.

In November 1988, while employed by Swift, Petitioner became ill and was required to undergo three

separate brain surgery procedures, including a left carotid embolization, a subsequent arteriovenous malformation clipping, and, several weeks later, an evacuation of an abscess in the same general region as the arteriovenous malformation. Subsequent to these surgeries, Petitioner suffered four significant seizures, two of which appear to have been grand mal.

Petitioner alleges that as a result of these three brain surgery procedures, he was totally disabled during the times he was employed by Swift, Piper, and Wedbush.

On January 15, 1990 Petitioner filed a claim for disability benefits payable under the Paul Revere policy issued to Swift's employees, which was rejected by Paul Revere on February 7, 1990. In September 1994 Petitioner filed a claim for disability benefits payable under Respondent's policy issued to Piper's employees, which was rejected on January 10, 1995. On January 26, 1996 Petitioner filed a claim for disability benefits payable under Respondent's policy issued to Wedbush's employees, which was rejected on April 24, 1996. Finally, Petitioner submitted a second claim to Paul Revere on May 30, 1996, which was rejected on July 18, 1996.

On May 22, 1996 Petitioner filed a complaint in the San Francisco Superior Court against Respondent, and later in an amended pleading also against Paul Revere, for breach of contract and for breach of the duty of good faith and fair dealing. On July 2, 1996 Respondent removed the case to federal district court claiming federal jurisdiction under ERISA.

After considering both written and oral argument, on June 17, 1997 the district court dismissed all of Petitioner's claims. With respect to Paul Revere's policy issued

to Swift's employees the district court found that the claim was barred by the statute of limitations; with respect to Respondent's policy issued to Piper's employees the district court found that Respondent did not abuse its discretion in determining that Petitioner was not disabled while he was employed at Piper; and with respect to Respondent's policy issued to Wedbush's employees the district court found that Petitioner had failed to exhaust his administrative remedies.

On August 18, 1997 Petitioner filed a timely notice of appeal with respect to all three of these adverse district court decisions. In an unpublished decision dated March 24, 1999 the Court of Appeals for the Ninth Circuit affirmed, and with respect to Petitioner's Wedbush claim the Court of Appeals found that the district court did not abuse its discretion in determining that Petitioner had failed to exhaust his administrative remedies.

Thereafter, in February 2000 Petitioner resubmitted his claim to Respondent and attempted to exhaust his administrative remedies under Respondent's policy issued to Wedbush's employees. A month later, in March 2000, Respondent rejected Petitioner's resubmitted claim. Thereafter, on April 20, 2000, Petitioner filed a second lawsuit against Respondent under the terms of its Wedbush policy. Respondent moved to dismiss this second complaint on the ground that it was barred by the doctrine of res judicata. In making that motion, Respondent argued that Petitioner's second complaint, filed in April 2000, involved the same parties and the same issues as the earlier complaint that was dismissed by the district court in 1997. Petitioner countered by arguing that the doctrine of res judicata did not apply because the previous lawsuit against Respondent under the Wedbush policy was not

decided on the merits, and therefore the doctrine of res judicata did not apply.

The district court agreed with Respondent that the doctrine of res judicata applied, and dismissed Petitioner's second lawsuit on that ground.[1]

On April 9, 2001 Petitioner filed a timely notice of appeal. In an unpublished decision dated May 10, 2002 (see App. 1 through 9), the Court of Appeals for the Ninth Circuit affirmed.

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[1] In the decisions of the Court of Appeals and the district court below (App. 4-5, 19-23), there was considerable discussion concerning the difference between "summary judgment" and "dismissal judgment." The Court of Appeals and the district court contended that because Petitioner's first lawsuit resulted in a "summary judgment," that constituted a decision on the merits. Petitioner urges that such a distinction has no merit. What controls here is not the "choice of labels" used to characterize a judgment, "especially where the consequence would be so drastic as to deprive a party of the opportunity to be heard." *Criales v. American Airlines*, 105 F.3d 93, 97 (2d Cir. 1997). This means that the court must look past the label used for the dismissal of Petitioner's first lawsuit and examine the substance of the pleadings therein. It is undisputed that in those pleadings the only reason Petitioner's claim under the Wedbush version of Respondent's policy was dismissed was due to Petitioner's failure to exhaust his administrative remedies. That "substance" clearly means that Petitioner's first lawsuit was dismissed for lack of jurisdiction, and not on the merits, and it should not make any difference whether the label "summary judgment" or "dismissal judgment" was used by the court in that first lawsuit.

REASONS FOR GRANTING THE WRIT

As previously indicated in this Petition, there is a single issue presented for the Court to consider, namely, whether an ERISA beneficiary who loses his or her first lawsuit due to failure to exhaust administrative remedies may file a second lawsuit after exhausting those administrative remedies.

The exhaustion of administrative remedies issue is important because this defense is being increasingly asserted by insurance companies to defend ERISA cases. These insurance companies now have at least two and often three or more layers of administrative review, and as a consequence a beneficiary claimant, such as Petitioner, often may not know with total certainty whether he or she has exhausted all administrative remedies before bringing suit in federal district court to recover ERISA benefits. In view of the fact that there are literally millions of people in the United States who are eligible for ERISA benefits, the Court should grant this Petition and review this issue of exhaustion of administrative remedies so that there is a uniform rule established throughout the United States to allow ERISA beneficiaries to resubmit their claims whenever their first claim is dismissed, not on the merits, but due to failure to exhaust administrative remedies.

1. THIS COURT SHOULD ESTABLISH AS A RULE OF LAW THAT WHENEVER A CASE BROUGHT BY AN ERISA BENEFICIARY IS INITIALLY DISMISSED FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES, THE BENEFICIARY MAY RESUBMIT HIS OR HER CLAIM TO THE PLAN ADMINISTRATOR OR THE INSURANCE COMPANY AND, AFTER SUBSEQUENTLY EXHAUSTING WHATEVER ADMINISTRATIVE REMEDIES ARE AVAILABLE, THE BENEFICIARY MAY FILE A SECOND LAWSUIT IN FEDERAL DISTRICT COURT TO ESTABLISH HIS OR HER BENEFITS UNDER THE APPLICABLE PLAN OR INSURANCE POLICY.

Early in ERISA's history, the Court of Appeals for the Ninth Circuit announced as a general rule that an ERISA claimant must avail himself or herself of a plan's own internal review procedures before bringing suit in federal district court. *Amato v. Bernard*, 618 F.2d 559, 566-68 (9th Cir. 1980). This holding in *Amato* has been followed in other Circuits. *Diaz v. United Agricultural Employee Welfare Benefit Plan and Trust*, 50 F.3d 1478, at footnote 3 (9th Cir. 1995).

While it is true that the text of ERISA nowhere mentions the exhaustion doctrine, courts have concluded from both the legislative history and from the text of ERISA that Congress intended to grant such authority to the courts, and that policy requires the application of the exhaustion doctrine in suits brought under the ERISA Act. *Amato v. Bernard*, *supra*, at p. 568.

Petitioner does not dispute the validity of Ninth Circuit case law which requires an ERISA beneficiary to

exhaust his or her administrative remedies prior to bringing suit to enforce those remedies in federal district court.

Instead, the issue here concerns what happens after the first lawsuit for ERISA benefits is dismissed for failure to exhaust administrative remedies. Petitioner contends that long-standing case law and textbook authorities all support the conclusion that the defense of failure to exhaust administrative remedies is a plea abatement, not a decision on the merits, therefore the ERISA claimant, after unsuccessfully resubmitting his or her claim to the plan or to the insurance company, has the right to file a second lawsuit to establish benefits due under the plan or the insurance policy and that second lawsuit would not be barred by the doctrine of res judicata because the first lawsuit was not decided on the merits, and one of the requirements for applying the doctrine of res judicata is that the first lawsuit must be decided on the merits. See, for example, *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) ("[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action"). See, also, *Blonder-Tongue Laboratories v. Univ. of Ill. Found.*, 402 U.S. 313, 323-324 (1971).

Thus the question presented here is whether in an ERISA case the dismissal of a prior lawsuit for failure to exhaust administrative remedies was a trial on the merits. The Ninth Circuit, has concluded that such a prior dismissal in an ERISA case is to be treated as a dismissal on the merits and therefore in an ERISA case a beneficiary may not file a second lawsuit to establish his or her claim after resubmitting the claim to the plan or to the insurance company in an effort to exhaust whatever administrative remedies are available. This holding by the Ninth

Circuit is contrary to the long-standing case law authority and other authority on this issue, and is inconsistent with ERISA's background, structure and legislative history which is based upon the reduction of frivolous litigation, the promotion of consistent treatment of claims, a nonadversarial method of claim settlement, the minimization of costs of claims settlement and a proper reliance on administrative expertise. *Diaz v. United Agricultural Employee Welfare Benefit Plan and Trust*, *supra*, at p. 1483.

In cases not involving ERISA, the Ninth Circuit has consistently held that dismissal on the ground that a claimant has failed to exhaust his or her administrative remedies is not a dismissal on the merits. *Heath v. Cleary*, 708 F.2d 1376, 1380 (9th Cir. 1983) (a civil rights action under 42 U.S.C. §1983 (1976)). See also *Bland v. Connally*, 293 F.2d 852, 855 (D.C. Cir. 1961).

The commentators on federal practice uniformly agree that dismissal for failure to exhaust administrative remedies is not a decision on the merits. For example, in Wright, Miller & Cooper, *Federal Practice and Procedure*, Volume 18, §4436, these writers state:

> There is little mystery about the res judicata effects of a judgment that dismisses an action for lack of subject or personal jurisdiction or for improper venue. Civil Rule 41(b) provides that a dismissal for lack of jurisdiction or improper venue does not operate as an adjudication upon the merits. *This provision means only that the dismissal permits a second action on the same claim that corrects the deficiency found in the first action.* . . . Similar effects attend dismissals that rest on matters closely related to jurisdiction, such as justiciability or a requirement of

prior resort to an administrative agency. (Emphasis added.)

See also *Moore's Federal Practice,* 3rd Ed., Vol. 18, §131.30(3)(b):

> Ordinarily, a judgment for the plaintiff is necessarily a judgment on the merits, since a judgment granting the requested relief necessarily established the claim. However, the defendant may sometimes prevail because the court determines that it has no subject matter jurisdiction, that personal jurisdiction of defendants or of indispensable parties is lacking, that venue is improper, *or that plaintiff has failed to comply with some prerequisite to filing suit, such as exhaustion of administrative remedies. In such cases, the resulting judgment of dismissal is not a determination of the claim, but rather a refusal to hear it, and the plaintiff may thereafter pursue it in an appropriate forum or when the preconditions have been met.* (Emphasis added.)

The same result is found in the *Restatement of the Law Second, Judgments 2d*, §20(2) which provides:

> A valid and final personal judgment for the defendant, which rests on the prematurity of the action or on the plaintiff's failure to satisfy a precondition to suit, does not bar another action by the plaintiff instituted after the claim has matured, or the precondition has been satisfied, unless a second action is precluded by operation of the substantive law.

The Supreme Court, in a leading case, has reached this same conclusion. In construing Federal Rules of Civil Procedure, Rule 41(b), which pertains to involuntary dismissals, the Court has interpreted the rule's "lack of

jurisdiction" exception broadly, giving the concept of "jurisdiction" meaning beyond its traditional personal and subject matter usages:

> [T]he exception . . . encompass[es] those dismissals which are based on a plaintiff's failure to comply with a precondition requisite to the Court's going forward to determine the merits of his substantive claim.

Costello v. United States, 365 U.S. 265, 285 (1961).

All of these authorities, taken together, uniformly hold that a dismissal of a case due to failure to exhaust administrative remedies is a plea in abatement, not a decision on the merits, and therefore the plaintiff has the right to file a second lawsuit after satisfying whatever procedural impediment may have existed, without fear of having the second lawsuit dismissed because of the doctrine of res judicata.

When confronted with this issue, the Ninth Circuit in this case made no attempt to analyze or discuss this issue. Instead, its entire decision rests upon the following conclusion:

> Sommer argues that res judicata does not apply because Judge Jensen did not, in fact, issue a final judgment on the merits in *Sommer I*. Sommer claims that his failure to exhaust his administrative remedies should have resulted in a dismissal without prejudice rather than summary judgment. Sommer is incorrect. *Summary judgment is an appropriate action where a plaintiff has failed to exhaust ERISA administrative remedies.* (App. 4.) (Emphasis added.)

The only authority the Ninth Circuit cited for this remarkable conclusion is the *Diaz* case (*Diaz v. United Agricultural Employee Welfare Benefit Plan & Trust*, *supra*, 1430); and the *Sarraf* case (*Sarraf v. Standard Ins. Co.*, 102 F.3d 991, 992 (9th Cir. 1996)). However, an examination of both of those cases indicates that they do not in any way support the Ninth Circuit's conclusion that a dismissal of a case for failure to exhaust administrative remedies is a dismissal on the merits. Instead, the *Diaz* and *Sarraf* cases merely hold that the first case brought by an ERISA claimant may be dismissed for failure to exhaust administrative remedies. There is no discussion in those cases regarding the consequences of a second lawsuit filed by the same ERISA claimant after subsequently exhausting his or her administrative remedies.

The district court's decision in this matter, dated April 9, 2001, which can be found at App. 9 through 24, starts off by citing Ninth Circuit cases, including for example, *Amato v. Bernard*, *supra*, at pp. 567-8, which contemplate that a plaintiff in an ERISA case could return to federal court after exhausting administrative remedies. *Amato*, at 569 ("The court will still be open to Amato when he has exhausted his appeals before the trust. . . . "). The district court also noted that other courts have similarly contemplated the return of the plaintiff to court after exhaustion in the ERISA context citing, for example, *Communications Workers of America v. American Telephone and Telegraph*, 40 F.3d 426, 434 (D.C. Cir. 1994); *Makar v. Health Care Corp. of Mid-Atlantic* (Carefirst), 872 F.2d. 80, 83 (4th Cir. 1989). (App. 15.)

The district court, after citing these cases, then attempts to evade the issue by concluding that since the district court in Petitioner's first case granted summary

judgment rather than dismissal, it was a decision on the merits and such a decision on the merits is proper in an ERISA case. (App. 23.) (See footnote 1, *supra*, for discussion of this distinction between "summary judgment" and "dismissal judgment".)

In summary, then, both the district court and the Court of Appeals for the Ninth Circuit failed to cite any authority for justification of their conclusion that in an ERISA case when the first lawsuit has been dismissed for failure to exhaust administrative remedies such a decision is a decision on the merits which bars the filing of a second lawsuit based upon the same claim. Such a conclusion is illogical and is unsupported by all leading case authority and all text book authority.

Equally important, such a conclusion is inconsistent with the overall purpose of ERISA, which is to allow claimants ready access to benefits whenever they are entitled to them. Increasingly, plans and insurance companies, with many layers of administrative review, are using this failure to exhaust defense to thwart these claims. Petitioner urges that whenever this occurs, the claimant should have the right to pursue his or her claim after subsequently exhausting those administrative remedies, and there are no provisions in the ERISA

statute itself or in the historical development of ERISA which prevent such a claimant from doing so.[2]

CONCLUSION

For the reasons set forth herein, the Petitioner respectfully urges this Court to grant certiorari so that a uniform ERISA rule is established indicating that an ERISA lawsuit that is dismissed initially for failure to exhaust administrative remedies may be refiled after the ERISA beneficiary subsequently exhausts those administrative remedies, and that the doctrine of res judicata would not bar the filing of that subsequent lawsuit.

Respectfully submitted,

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[2] In a separate but related matter, the district court below granted Respondent's motion for Rule 11 sanctions and for attorney's fees pursuant to 29 U.S.C. §1132(g). On appeal, the Ninth Circuit affirmed. (App. 5-8.) Petitioner and his counsel continue to object to the imposition of these Rule 11 sanctions and these attorney's fees pursuant to §1132(g). In the event this Petition is granted and the Court issues a writ of certiorari, Petitioner and his counsel urge the Court to sustain these objections and to order that these Rule 11 sanctions and these attorney's fees pursuant to §1132(g) be set aside.

APPENDIX
NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALEXANDER P. SOMMER, Plaintiff-Appellant, v. UNUM LIFE INSURANCE COMPANY OF AMERICA, Defendant-Appellee.	Nos. 01-15733 D.C. No. CV-00-1368 SBA (Filed May 10, 2002)
ALEXANDER P. SOMMER, an individual, Plaintiff, v. UNUM LIFE INSURANCE COMPANY OF AMERICA, a corporation, Defendant-Appellee, JOHN G. WARNER, Real-party-in-interest-Appellant.	No. 01-15734 D.C. No.CV-00-01368-SBA

ALEXANDER P. SOMMER, an individual,

Plaintiff-Appellant,

v.

FIRST UNUM LIFE INSURANCE COMPANY, a corporation, et al.,

Defendants-Appellees.

No. 01-15735
D.C. No.
CV-96-02407-
DLJ(PJH)

ALEXANDER P. SOMMER, an individual,

Plaintiff,

v.

UNUM LIFE INSURANCE COMPANY OF AMERICA, a corporation;,

Defendant-Appellee,

JOHN G. WARNER,

Real-party-in-interest-Appellant.

No. 01-15736
D.C. No.
CV-00-1368-SBA
MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Saundra B. Armstrong, District Judge, Presiding

Argued and Submitted April 11, 2002
San Francisco, California

Before SCHROEDER, Chief Judge, B. FLETCHER and KOZINSKI, Circuit Judges.

Beginning in the mid-1990s, Appellant Alexander Sommer sought disability benefits under policies he obtained through his employer, Wedbush. Following denial of benefits by appellee UNUM, he sued in federal court.

This panel's consideration is the fifth given to this case in the federal courts. District Court Judge Jensen issued a final judgment in *Sommer I*. This court affirmed the summary judgment. *Sommer v. UNUM Life Ins. Co. of Am.*, 1999 U.S. App. LEXIS 5388 (9th Cir. 1999). Sommer filed his claim with the company again. His claim was for the same disability and the same policy, so UNUM rejected it again. Following this second rejection, Sommer filed his second suit in federal district court. In *Sommer II*, District Judge Armstrong dismissed the case based on lack of jurisdiction because *Sommer I* was pending before the Ninth Circuit and also imposed $1,000 in Rule 11 sanctions. She noted that even if the court did have jurisdiction, *Sommer II* would be barred by res judicata as a result of *Sommer I*. This court agreed, affirming on res judicata grounds. *Sommer v. UNUM Life Ins. Co. of Am.*, 1999 U.S. App. LEXIS 5382 (9th Cir. 1999). After yet another rejection of the same disability claim by UNUM, Sommer brought a third suit, again in Judge Armstrong's court. The district court dismissed *Sommer III* on res judicata grounds. The district court also imposed $2,500 in Rule 11 sanctions and assessed attorneys' fees and costs against Sommer's attorney pursuant to 29 U.S.C. § 1132(g)(1).

Sommer appeals these *Sommer III* decisions, as well as Judge Jensen's refusal to amend his final judgment in *Sommer I* per Sommer's Rule 60(a) motion. We have

jurisdiction over all of Sommer's claims pursuant to 28 U.S.C. § 1291. We affirm the *Sommer III* district court's decision in all respects. We also affirm the *Sommer I* court's denial of Sommer's Rule 60(a) motion for correction of a clerical mistake.

Because the parties are familiar with the facts underlying Sommer's appeal, we repeat them only as necessary.

Sommer claims that District Judge Armstrong erred when she granted UNUM summary judgment in *Sommer III* on res judicata grounds. We review an order granting summary judgment de novo. *Delta Sav. Bank v. United States,* 265 F.3d 1017, 1021 (9th Cir. 2001). To trigger the doctrine of res judicata, the earlier suit must have (1) involved the same "claim" or cause of action as the later suit, (2) reached a final judgment on the merits, and (3) involved identical parties or privies. *Sidhu v. Flecto Co.,* 279 F.3d 896, 900 (9th Cir. 2002).

Sommer argues that res judicata does not apply because Judge Jensen did not, in fact, issue a final judgment on the merits in *Sommer I.* Sommer claims that his failure to exhaust his administrative remedies should have resulted in a dismissal without prejudice rather than summary judgment.

Sommer is incorrect. Summary judgment is an appropriate action where a plaintiff has failed to exhaust ERISA administrative remedies. *Diaz v. United Agric. Employee Welfare Benefit Plan & Trust,* 50 F.3d 1478, 1480 (9th Cir. 1995); *Sarraf v. Standard Ins. Co.,* 102 F.3d 991, 992 (9th Cir. 1996). Judge Jensen recognized as much by citing *Denton v. First Nat'l Bank,* 765 F.2d 1295 (5th Cir. 1985), which holds that, although remand is often desirable,

summary judgment is also appropriate where a plaintiff has failed to exhaust remedies.

Next Sommer argues that Judge Armstrong abused her discretion when she imposed Rule 11 sanctions in *Sommer III*. Orders imposing Rule 11 sanctions are reviewed for an abuse of discretion. *Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772, 788 n.16 (9th Cir. 2001). A district court abuses its discretion in imposing sanctions when it bases its decision on an erroneous view of the law or on a clearly erroneous assessment of the evidence. *Weissman v. Quail Lodge, Inc.*, 179 F.3d 1194, 1198 (9th Cir. 1999).

Judge Armstrong imposed Rule 11 sanctions after finding that the *Sommer III* complaint was frivolous in light of *Sommer I* and *Sommer II*. We agree. As Judge Armstrong noted, Sommer's counsel "should have known, after *Sommer I* and *Sommer II*, that the claim for benefits under the Wedbush policy was barred by the doctrine of res judicata." This court held in *Sommer II* that res judicata barred the claims, thus foreclosing relitigation of whether or not there was a final judgment in *Sommer I*. Seeking another bite at the apple by filing *Sommer III* in the hope of a different result was frivolous. Judge Armstrong did not abuse her discretion when she imposed sanctions under Rule 11.

Sommer also challenges Judge Armstrong's order requiring Sommer's attorney to pay $6,574.85 in attorneys' fees and costs to UNUM. Judge Armstrong imposed sanctions under ERISA pursuant to 29 U.S.C. § 1132(g)(1). That section provides:

> In any action under this subchapter (other than an action described in paragraph (2)) by a participant,

> beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

In *Hummell v. Rykoff & Co.*, 634 F.2d 446, 453 (9th Cir. 1980), we set out five factors a court should consider in exercising its discretion to award fees and costs under § 1132(g)(1): (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of fees; (3) whether an award of fees against the opposing parties would deter others from acting under similar circumstances; (4) whether the parties requesting fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA; and (5) the relative merits of the parties' positions. *Id.*

We review an award of attorneys' fees pursuant to ERISA under an abuse of discretion standard. *Id.* at 452. We will find an abuse of discretion only when we have a definite conviction that the court made a clear error of judgment in its conclusion upon weighing relevant factors. *Id.*

Sommer does not argue with the district court's specific findings with respect to the *Hummell* factors. Instead, he argues that Judge Armstrong did not have the authority to impose the fees and costs on his attorney because counsel was not "a participant, beneficiary, or fiduciary" per § 1132(g)(1). Sommer is mistaken in his reading of the statute. Section 1132(g)(1) requires only that the underlying action be brought by a participant, beneficiary, or fiduciary. The text in no way limits the imposition of fees and costs to those entities. Judge Armstrong stated as much in her order, citing *Corder v. Howard Johnson & Co.*, 53 F.3d 225 (9th Cir. 1994) ("Where

one of the above enumerated parties – participant, beneficiary, or fiduciary – brings an action, the district court has discretion to award attorney's fees to either plaintiffs or defendants.") Judge Armstrong considered each *Hummell* factor carefully and concluded that *Hummell* factors 1, 2, 3, and 5 weighed strongly in favor of imposing attorneys' costs and fees against Sommer's counsel. She did not abuse her discretion in awarding UNUM fees and costs.

Sommer's final claim arises out of *Sommer I* and is very similar to his res judicata argument in *Sommer III* (see above). While *Sommer III* was pending before Judge Armstrong, Sommer filed a motion with Judge Jensen pursuant to Rule 60(a). In it, Sommer argued that Judge Jensen's designation of his final order in *Sommer I* as a "summary judgment" rather than a "dismissal judgment" was a clerical error.

Rule 60(a) provides that:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party or after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

In his denial of Sommer's Rule 60(a) motion, Judge Jensen made clear that there was, in fact, no clerical error: he intended his June 17, 1997 order in *Sommer I* to be a summary judgment, and not a dismissal without prejudice. As discussed above, either was within the district court's authority because Sommer had failed to exhaust

his administrative remedies as ERISA requires. Furthermore, Rule 60(a) applies during the pendency of an appeal. By the time Sommer filed his Rule 60(a) motion, the *Sommer I* appeal had been over for nearly two years.

We affirm the judgments of both district courts. We will not entertain a motion for any additional damages pursuant to Rule 38. These cases are concluded.

AFFIRMED.

UNITED STATES DISTRICT COURT

For the Northern District of California

ALEXANDER P. SOMMER, Plaintiff, V. UNUM LIFE INSURANCE CO. OF AMERICA, et al., Defendants.	No. C-96-02407-DLJ **ORDER** (Filed Apr. 9, 2001)

On February 9, 2001, plaintiff filed a Motion to Correct a Clerical Mistake pursuant to Federal Rule of Civil Procedure 60(a). Defendant UNUM Life Insurance Co. filed an opposition on February 27, 2001, and plaintiff replied on March 6, 2001. Having considered the papers submitted, the applicable law, and the record in this case, the Court hereby DENIES plaintiff's motion.

I. BACKGROUND

A. Factual Background and Procedural History

This litigation concerns plaintiff Alexander P. Sommer's repeated attempts to receive long-term disability benefits under the disability insurance policies of his securities firm employers. Plaintiff was employed as an account executive for Henry F. Swift & Co. ("Swift"), a securities firm, from November 1988 through December 1992. Throughout plaintiff's employment with Swift, defendant The Paul Revere Life Insurance Company ("Paul Revere") issued long-term disability insurance policies to employees such as plaintiff. After Swift merged with Piper Jaffray, Inc. ("Piper") in January 1993, plaintiff

continued to work as an account executive for Piper. However, plaintiff was fired by Piper in August 1994 for lack of production. Approximately one month later, plaintiff obtained employment as an account executive at Wedbush Morgan Securities ("Wedbush"), where he was employed from September 1994 through January 1996. In January 1996, plaintiff's poor health forced him to terminate this employment. While plaintiff worked for both Piper and Wedbush, defendant UNUM Life Insurance Company of America ("UNUM") issued long-term disability policies to employees such as plaintiff.

In November 1988, while employed by Swift, plaintiff fell ill and was eventually required to undergo three separate brain surgeries. Plaintiff alleges that as a result of these surgeries, he was totally disabled during the times he was employed by Swift, Piper, and Wedbush, due to organic brain deficits. On January 15, 1990, plaintiff filed a claim for disability benefits with Paul Revere, which was rejected on February 7, 1990. In September 1994, plaintiff filed a claim with UNUM for disability benefits payable under the terms of the Piper policy. On July 10, 1995, plaintiff's claim was rejected by UNUM. On January 26, 1996, plaintiff filed a disability claim with UNUM under the Wedbush policy. That claim was denied by UNUM on April 24, 1996. In addition, plaintiff submitted a second claim to Paul Revere on May 30, 1996, which was denied on July 18, 1996.

On May 22, 1996, plaintiff filed a complaint in San Francisco superior Court against UNUM and twenty DOE defendants for breach of contract and breach of the duty of good faith and fair dealing. On July 2, 1996, defendant UNUM removed the case to federal court claiming federal jurisdiction under the Employee Retirement Income Security

Act of 1974 (ERISA), 29 U.S.C. § 1144(a) & (b)(2)(A). This Court granted plaintiff leave to file a first amended complaint alleging ERISA claims against defendants UNUM, Paul Revere, Swift, Piper, and Security Industry Benefits Services, a plan administrator for Wedbush.

Plaintiff's First Amended Complaint, filed on September 6, 1996, alleged two causes of action under ERISA ("*Sommer I*"). First, plaintiff asserted a claim under the civil enforcement provisions of ERISA, 29 U.S.C. § 1132(a)(1)(B), to recovery benefits owed to him under the terms of the benefit plans. Second, plaintiff asserted a claim for equitable relief, pursuant to 29 U.S.C. § 1132(a)(3), seeking to compel defendants to pay him future benefits owed under the terms of defendants' respective policies.

On February 10, 1997, Swift, Piper, and Security Industry Benefits Services were dismissed as defendants in this action pursuant to a stipulation by the parties, leaving defendants Paul Revere and UNUM in the action.

Plaintiff then filed various motions: to file a second amended complaint, to augment the administrative record, and for appointment of guardians ad litem. Meanwhile, remaining defendants Paul Revere and UNUM moved for summary judgment on all of plaintiff's claims. On June 17, 1997, the Court issued an Order granting summary judgment for defendants. Judgments in favor of defendants were entered that same day. In granting summary judgment for defendant Paul Revere, the Court found that the statute of limitations had run on plaintiff's claim. *See* Order of June 17, 1997 at 11-16. In granting summary judgment for defendant UNUM, the Court found that plaintiff had failed to exhaust his administrative remedies regarding the Wedbush policy, since he did not appeal the

denial of benefits to UNUM's Quality Review Section, as required by the terms of the policy. *See id.* at 30-31.

On June 30, 1997, plaintiff filed a motion for reconsideration of the summary judgment order pursuant to Rule 59(a) of the Federal Rules of Civil Procedure. On August 4, 1997, the Court denied plaintiff's motion for reconsideration. *See* Order of August 4, 1997. Plaintiff timely appealed the summary judgment and reconsideration orders to the Ninth Circuit.

During the pendency of the appeal to the Ninth Circuit, plaintiff filed a subsequent complaint on November 13, 1997. This complaint alleged essentially the same facts and claims as the Second Amended Complaint, and the case came before Judge Saundra Brown Armstrong of this District ("*Sommer II*"). Judge Armstrong ruled that the court did not have jurisdiction to adjudicate the issues presented because all of plaintiff's claims were then currently being appealed to the Ninth Circuit from the action before this court, *Sommer I. See Sommer v. Unum Life Ins. Co., et al.*, No. C-97-4159-SBA (N.D. Cal. Mar. 27, 1998) ("*Sommer II*"). Further, Judge Armstrong found that even if the court had jurisdiction, plaintiff's claims would be barred by res judicata. Judge Armstrong sanctioned plaintiff $1000 pursuant to Rule 11 of the Federal Rules of Civil Procedure. *See id.* On March 26, 1998, plaintiff moved for reconsideration of Judge Armstrong's March 27, 1998 order. Judge Armstrong rejected plaintiff's arguments that res judicata did not apply, and denied plaintiff's motion. *See Sommer v. Unum Life Ins. Co., et al.*, No. C-97-4159-SBA (N.D. Cal. April 21, 1998). Plaintiff then timely appealed Judge Armstrong's rulings to the Ninth Circuit.

On March 24, 1999, the Ninth Circuit affirmed *Sommer I* and *Sommer II*. *See Sommer v. Unum Life Ins. Co., et al.*, Nos. 97-16564, 98-16340 (9th Cir. Mar. 24, 1999). The Ninth Circuit did not explicitly comment upon this Court's grant of summary judgment to defendant UNUM regarding the Wedbush policy.

On April 20, 2000, plaintiff filed a third complaint against UNUM, again seeking damages for an unlawful denial of benefits under ERISA ("*Sommer III*"). Judge Armstrong dismissed the complaint on defendant's motion on the grounds of res judicata, and sanctioned plaintiff $2,500. *See Sommer v. UNUM Life Insurance,* No. 00-01368-SBA (N.D. Cal. January 8, 2001). Judge Armstrong found that the complaint was frivolous, and that plaintiff's counsel "should have known, after *Sommer I* and *Sommer II,* that the claim for benefits under the Wedbush policy was barred by the doctrine of res judicata." *See id.* at 5.

Plaintiff now moves, pursuant to Rule 60(a) of the Federal Rules of Civil Procedure, to correct a clerical mistake contained in the June 17, 1997 Order of this Court. Defendant UNUM opposes and moves for sanctions, and the motions are now before the Court.

B. Legal Standard

1. Correction of Clerical Errors

Rule 60(a) of the Federal Rules of Civil Procedure provides for the correction of clerical errors in district court orders:

> Clerical mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission

> may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

Fed. R. Civ. P. 60(a).

Rule 60(a) gives a district court the authority to "make an order reflect the actual intentions of the court, plus necessary implications." *Jee v. Hanil Bank, Ltd.*, 799 F.2d 532, 535 (9th Cir. 1986) (quoting *Jones & Guerrero Co. v. Sealift Pacific*, 650 F.2d 1072, 1074 (9th Cir. 1981)). "Errors correctable under Rule 60(a) include those where what is spoken, written, or recorded is not what the court intended to speak, write or record." *Jee*, 799 F.2d at 532. Under Rule 60(a), a court has "very wide latitude in correcting clerical mistakes in a judgment." *Id.* (quoting *Woodworkers Tool Works v. Byrne*, 191 F.2d 667, 676 9th Cir. 1951)).

2. Failure to Exhaust in the ERISA Context

In *Amato v. J.W. Bernard*, 618 F.2d 559, 567-8 (9th Cir. 1980), the Ninth Circuit announced the principle that a district court may find that it lacks jurisdiction to hear a claim under ERISA on the grounds that plaintiff has failed to exhaust his or her administrative remedies. *Amato* has become an authority followed in other circuits in announcing and adhering to the exhaustion requirement. *See Kennedy v. Empire Blue Cross and Blue Shield*, 989 F.2d 588, 594 (2d Cir. 1993); *Makar v. Health Care Corp. of Mid-Atlantic (Carefirst)*, 872 F.2d 80, 83 (4th Cir. 1989). The *Amato* court contemplated that the plaintiff in that case could return to federal court after exhausting administrative remedies. *Amato*, 618 F.2d at 569 ("The court will

still be open to Amato when he has exhausted his appeals before the Trust"). Other courts following *Amato* have similarly contemplated the return of plaintiff after exhaustion in the ERISA context. *See Communications Workers of America v. American Telephone and Telegraph*, 40 F.3d 426, 434 (D.C. Cir. 1994) ("We therefore vacate the District Court's judgment . . . and remand to the District Court with instructions to dismiss the claim without prejudice in order to allow appellees to exhaust their plan remedies."); *Makar*, 872 F.2d at 83 ("We therefore vacate the district court's order and remand the case to be dismissed without prejudice . . . in order to allow the Makars the opportunity to pursue their remedies under the . . . employee benefit plans."); *Harrison v. California Care*, 1994 WL 69469 at *4 (N.D. Cal.) (Patel J.) ("The Harrisons must fully exhaust all Policy grievance procedures before reinstating this action in federal court.")

The principle announced in *Amato*, that a district court may find lack of jurisdiction in the ERISA context based upon plaintiff's failure to exhaust administrative remedies, was applied in *Diaz v. United Agricultural Employee Welfare Benefit Plan and Trust*, 50 F.3d 1478, (9th Cir. 1995) in the context of summary judgment. Citing *Amato*, the *Diaz* court affirmed the district court's grant of summary on the grounds of failure to exhaust. *Id.* at 1480, 1483. The *Diaz* court did not note or examine the distinction between dismissing for lack of jurisdiction and granting summary judgment. Like the *Diaz* court, other courts have granted or affirmed summary judgment based upon failure to exhaust in the ERISA context. *See Terry v. Bayer Corporation*, 145 F.3d 28, 40 (1st Cir. 1998) (affirming summary judgment for failure to exhaust); *Kennedy*, 989 F.2d at 590, 592 (affirming district court's conversion

of 12(b)(6) motion to a Rule 56 motion because materials in addition to complaint were considered on issue of exhaustion); *Pengilly v. Guardian Life Insurance Co. of America*, 81 F.Supp.2d 1010, 1025 (N.D. Cal. 2000) ("In light of this failure to exhaust, the Court grants defendant's motion for summary judgment").

3. Sanctions

Federal courts have inherent powers to impose monetary or injunctive sanctions against both attorneys and parties for "bad faith" conduct in litigation or for "willful disobedience" of a court order. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991). The court's inherent powers are governed by the control necessarily vested in courts to achieve orderly and expeditious outcomes. *See id.* However, this power is "not a broad reservoir of power, ready at an imperial hand, but a limited source. . . . " *Id.* Courts should not rely on their inherent powers where the conduct in question may be adequately addressed under other rules. *See Chambers*, 501 U.S. at 51-52.

In order to impose sanctions against an attorney under its inherent powers, the court must make a specific finding that the attorney acted in "bad faith". *See id.* at 44. "Bad faith" means that the party or counsel acted "vexatiously, wantonly or for oppressive reasons." *Id.* at 45-6. Sanctions under the court's inherent powers cannot be based on mere recklessness. *See In re Keegan Management Co. Secur. Litig.*, 78 F.3d 431, 436 (9th Cir. 1996). "A finding of bad faith 'does not require that the legal and factual basis for the action prove totally frivolous . . . [if] a litigant is substantially motivated by vindictiveness, obduracy, or mala fides. . . . '" *Mark Industries, Ltd. v. Sea Captain's Choice, Inc.*, 50 F.3d 730, 732 (9th Cir. 1995)

(quoting *Lipsig v. National Student Marketing Corp.*, 663 F.2d 178, 181 (D.C. Cir. 1980)).

II. DISCUSSION

A. Parties' Arguments

Plaintiff moves to correct what he views as a clerical error in this Court's June 17, 1997 Order granting summary judgment to then-remaining defendants Paul Revere and UNUM. Plaintiff was covered by two different UNUM policies, one through employer Piper and one through employer Wedbush. It is the Wedbush policy that is at issue in this motion. The Court granted summary judgment to UNUM with respect to the Wedbush policy on the grounds that plaintiff had failed to exhaust his administrative remedies. *See* Order of June 17, 1997 at 30-31. The Court nowhere stated that the claim was "dismissed" or whether it was dismissed with or without prejudice. Plaintiff now argues that the Court should correct this clerical error by indicating that the claim was dismissed without prejudice.

In support, plaintiff cites *In re Marc Rich & Co. A.G.*, 739 F.2d 834, 837-8 (2d Cir. 1984) and *Moore's Federal Practice* for the proposition that under Federal Rule of Procedure 60(a), clerical errors not ruled on explicitly or implicitly by the appellate court may be corrected by the district court even after appeal. Plaintiff also cites *In re Jee*, 799 F.2d 532 (9th Cir. 1986) for the proposition that whenever a dismissal or judgment is silent as to its prejudicial effect, an amendment is appropriate under Rule 60(a). Plaintiff states that it is undisputed that this Court did not indicate its intentions with respect to the prejudicial

effect of the dismissal, and argues that amendment under 60(a) is therefore appropriate.

As for the content of that amendment, plaintiff argues that the amendment should reflect the Court's intention in June of 1997 that the claim be dismissed without prejudice. According to plaintiff, the relevant case law indicates that failure to exhaust should be raised by a motion to dismiss, not a motion for summary judgment. *See Ritza v. Int'l Longshoremen's and Warehousemen's Union*, 837 F.2d 365 (9th Cir. 1988) (failure to exhaust is a matter in abatement, not going to merits of claim, thus not properly raised in summary judgment); *Stauffer Chemical Co. v. Food & Drug Administration*, 670 F.2d 106 (9th Cir. 1982) (failure to exhaust should be raised by motion to dismiss, not motion for summary judgment); *Studio Electrical Technicians v. International Photographers*, 598 F.2d 551 (9th Cir. 1979) (failure to exhaust is a matter in abatement and ordinarily does not deal with merits of case). Once the failure to exhaust is properly considered as an issue for dismissal rather than for summary judgment, plaintiff argues, it should become clear to the Court that the dismissal was intended to be without prejudice, in order to give plaintiff the opportunity to exhaust administrative remedies and then return to the federal courts for redress.

Plaintiff next explains the practical import of the correction it seeks. In the fall of 1999, purportedly in an attempt to exhaust his administrative remedies as directed by this Court, plaintiff resubmitted his claim to UNUM asking them to reconsider its denial of benefits to plaintiff. Rather than consider the claim on the merits, UNUM took the position that this Court's June 17, 1997 summary judgment order was a decision on the merits,

and that UNUM therefore had no legal obligation to review plaintiff's disability claim. At that point, on April 20, 2000, plaintiff brought suit in the Northern District again ("*Sommer III*"), and the case was assigned to Judge Armstrong, who dismissed it upon the motion of UNUM on the grounds of res judicata. *See Sommer v. UNUM Life Insurance*, No. 00-01368-SBA (N.D. Cal. January 8, 2001). Judge Armstrong found that "Judge Jensen's decision [of June 17, 1997] granting summary judgment was a final judgment on the merits of the same claim that plaintiff raises here today." *See id.* at 5. Plaintiff believes that Judge Armstrong's finding that this Court's decision was a "judgment on the merits" is incorrect. If this Court clarifies its June 17, 1997 Order to say that the claim against UNUM with respect to the Wedbush policy was dismissed without prejudice, plaintiff will seek reconsideration of Judge Armstrong's January 8, 2001 order dismissing *Sommer III*.

Defendant UNUM responds that this Court entered "summary judgment," and did not "dismiss" the case, and that therefore the Order of June 17, 1997 represents a final adjudication on the merits. Moreover, defendant cites *Diaz v. United Agricultural Employee Welfare Benefit Plan and Trust*, 50 F.3d 1478, 1483 (9th Cir. 1995) and *Pengilly v. The Guardian Life Insurance Co. of America*, 81 F.Supp.2d 2010, 1023 (N.D.Cal. 2000) for the proposition that under ERISA, summary judgment should be entered, not a dismissal without prejudice, when a claimant files suit without exhausting administrative remedies. Defendant emphasizes that none of the cases plaintiff cites for the proposition that failure to exhaust should be raised by a motion to dismiss rather than summary judgment (*Ritza, Stauffer*, and *Studio Electrical*) are ERISA cases.

Defendant also argues that plaintiff's motion is not properly brought under Rule 60(a) because it is not actually designed to correct a clerical error, but to affect the substantive rights of the parties. Plaintiff's failure to seek clarification of the order or correction of the purported defect at an earlier time also weighs against plaintiff according to defendant.

Defendant next argues that the motion cannot be granted because the Court cannot alter or amend the ruling of the Ninth Circuit affirming *Sommer I*, which is essentially what plaintiff requests by the instant motion. Defendant contends that by expressly affirming this Court's summary judgment in favor of UNUM, the Ninth Circuit has effectively precluded further review of the issue by this Court.

Finally, defendant moves for sanctions in an amount greater than $3500 on the theory that Judge Armstrong's previous imposition of $1000 and $2500 sanctions did not deter plaintiff from coming back to the Northern District with the same claim that has been rejected several times before. Defendant believes that the Court has the inherent power to sanction plaintiff for bad faith conduct, and additionally that 28 U.S.C. § 1927 authorizes the Court to sanction plaintiff for "multipl[ying] the proceedings in [this] case unreasonably and vexatiously."

B. Analysis

1. Motion to Correct Clerical Mistake

Rule 60(a) gives the Court broad discretion to alter a judgment to reflect what the Court intended at the time of judgment. The question before the Court, then, is what was actually intended when the Court granted summary

judgment to UNUM regarding the Wedbush policy in June of 1997.

The Court begins its analysis with text of its June 17, 1997 Order, which states:

> UNUM argues that because plaintiff failed to appeal this denial of his benefits, his present ERISA claim must fail. While the text of ERISA does not mention an exhaustion doctrine, the Ninth Circuit holds that federal courts should usually require benefits claimants to exhaust their administrative remedies prior to seeking federal court review of a benefits denial. *Amato v. Bernard*, 618 F.2d 559 (9th Cir. 1980); *see also Denton v. First National Bank*, 765 F.2d 1295, 1303 (5th Cir. 1985) (citing *Amato*). Here, plaintiff was informed in the April 24, 1996 letter denying his benefits that he had to file any appeal of UNUM's decision within 60 days of receipt of the notice of denial. The letter also apprised plaintiff of the appeal procedures. Rather than file an appeal, plaintiff filed the present lawsuit. Because plaintiff now makes no argument as to why an administrative appeal would have been futile, the Court holds that his present claim is barred for failure to exhaust his administrative remedies.
>
> In sum, the Court finds that summary judgment must be granted in favor of defendants Paul Revere and UNUM on all of plaintiff's claims.

Order of June 17, 1997 at 30-31.

The Court disagrees with plaintiff that the June 17, 1997 Order is ambiguous, and does not indicate its intended prejudicial effect. To the contrary, the Court finds

that a plain reading of the Order indicates the Court's intention to grant summary judgment, with its attendant consequences to plaintiff. First, the Court unequivocally used the words "summary judgment," and entered a separate judgment on the same day against plaintiff and in favor of UNUM. *See* Judgment of June 17, 1997. Second, the Order made no mention of plaintiff's return to this Court after exhaustion. Third, the Order cited *Denton v. First National Bank of Waco, Texas,* 765 F.2d 1295 (5th Cir. 1985). That Fifth Circuit case reversed a district court's denial of summary judgment in the ERISA context where plaintiff failed to exhaust administrative remedies. The *Denton* court noted that a remand designed to allow a plaintiff to exhaust administrative remedies was often the appropriate disposition in such a situation, but went on to reason that because plaintiff had already had two trials prior to the appeal, providing the Court of Appeals with a "fully fleshed out" record, the Circuit should instead enter judgment for defendant. This Court's citation of *Denton* supports the notion that the Court actually intended to enter judgment and not to dismiss without prejudice, the same route taken by the *Denton* court.

Looking past the text of the June 17, 1997 Order, there is further evidence of this Court's intent to enter summary judgment in the unambiguous Ninth Circuit precedent supporting that result. In *Diaz v. United Agricultural Employee Welfare Benefit Plan and Trust*, 50 F.3d 1478 (9th Cir. 1995), decided two years before the June 1997 Order in this case, the Circuit affirmed a district court's grant of summary judgment in the ERISA context on the grounds of failure to exhaust. *Id.* at 1480, 1483. A 1993 case from the Second Circuit provided further support for this Court's conclusion. *See Kennedy*, 989 F.2d at

590, 592 (affirming district court's conversion of 12(b)(6) motion to a Rule 56 motion because materials in addition to complaint were considered on issue of exhaustion). The Court also notes that decision subsequent to the June 17, 1997 Order support the grant of summary judgment in this context. *See Terry v. Bayer Corporation*, 145 F.3d 28, 40 (1st Cir. 1998) (affirming summary judgment for failure to exhaust); *Pengilly v. Guardian Life Insurance Co. of America*, 81 F.Supp.2d 1010, 1025 (N.D. Cal. 2000) ("In light of this failure to exhaust, the Court grants defendant's motion for summary judgment"). While these cases say nothing about the Court's intent at the time of the June 17, 1997 Order, they do indicate the propriety of the Court's conclusion. The Ninth Circuit's affirmance of this Court's grant of summary judgment obviously indicates the same. *See Sommer v. Unum Life Ins. Co., et al.*, Nos. 97-16564, 98-16340 (9th Cir. Mar. 24, 1999).

For all of these reasons, the Court DENIES plaintiff's Motion to Correct a Clerical Mistake.

2. Sanctions

The Court declines to impose sanctions on plaintiff for bringing the instant motion, as the Court finds it was brought neither in bad faith, nor with the intent to multiply proceedings needlessly. In fact, it appears that the question of whether the Court should have dismissed plaintiff's claim without prejudice rather than granting summary judgment is a close one. *See e.g. Amato*, 618 F.2d at 567-8 (affirming district court's decision that it did not have jurisdiction because of failure to exhaust in the ERISA context); *Communications Workers*, 40 F.3d at 434 (remanding with instructions to district court to dismiss

the claim without prejudice in order to allow appellees to exhaust plan remedies); *Makar*, 872 F.2d at 83 (same); *Harrison*, 1994 WL 69469 at *4 (dismissing with statement that plaintiffs "must fully exhaust all Policy grievance procedures before reinstating this action in federal court.") However, because it is apparent that Rule 60(a) calls upon the Court to examine what it intended to do in its June 17, 1997 Order – not what it would do if now presented with the same question – the Court declines to provide plaintiff with the relief he seeks.

III. CONCLUSION

For the foregoing reasons, plaintiff's Motion to Amend a Clerical Mistake is DENIED.

IT IS SO ORDERED

Dated: April 9, 2001

/s/ Lowell Jensen
D. Lowell Jensen
United States District Judge